BRB No. 94-0497

STEVEN J. LAWRENCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	DATE ISSUED:
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Melissa R. Link (Mason & Mason), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-1810, 91-LHC-884, 91-LHC-1205) of Administrative Law Judge Richard K. Malamphy denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a machinist for employer, and he injured his right knee when he

[1]By Order dated August 24, 1995, this case was remanded to the district director so that the parties could pursue a settlement of this claim. The settlement was not consummated, and by Order dated May 15, 1996, this case was reinstated on the Board's docket at claimant's request. The Board considers May 15, 1996, to be the relevant date for purposes of the one-year period referenced in Public Laws 104-134 and 104-208.

slipped and fell on August 25, 1985. Claimant returned to light duty work on September 15, 1986, after arthroscopic surgery. On February 23, 1987, claimant injured his left knee when he hit his leg and was diagnosed as having a contusion. Dr. Nichols found that claimant's right knee reached maximum medical improvement in March 1989, with a 15 percent impairment. Claimant was unable to perform his usual work because of restrictions and employer let him go on October 16, 1989. Claimant started working for a florist in May 1992 and was fired from this position in November 1992. Claimant received a state award through November 24, 1992, and the parties stipulated that this award would completely offset any longshore benefits for the same period. Claimant sought continuing temporary benefits for an impairment to the left knee.

In his Decision and Order, the administrative law judge found that no physician gave an impairment rating for claimant's left knee, that the left knee condition became permanent on September 16, 1992, that employer established the availability of suitable alternate employment by virtue of the florist job, and that claimant was not entitled to temporary total or partial disability benefits after November 24, 1992. On appeal, claimant contends that he is entitled to temporary total and partial disability benefits. Employer responds, urging affirmance of the denial of benefits.

In the instant case, the parties stipulated that claimant sustained a left knee injury on February 28, 1987, and that claimant is entitled to periods of disability at various rates if the administrative law judge were to find that the left knee injury contributes to claimant's current disability, that there is no intervening cause of claimant's disability, and that claimant's left knee has not reached maximum medical improvement.[2] Claimant first contends that his current disability is due to a combination of the left knee injury and the prior right knee injury. The parties stipulated that claimant is unable to perform his usual work, and claimant's contention that his inability to perform this work due in part to the left knee injury is supported by the opinion of Dr. Nichols, which was credited by the administrative law judge.[3] Dr. Nichols assigned specific restrictions of no squatting,

[2]Employer alleged that a car accident in November 1990 was an intervening cause of claimant's disability. The administrative law judge found that there was no additional injury due to the car accident, and this finding is not challenged on appeal.

[3]Dr. Blasdell found that claimant's left knee injury is unrelated to the work accident of August 18, 1985, in which claimant injured his right knee. Emp. Ex. A. However, Dr. Blasdell does not address whether claimant's work restrictions are due to both knees

kneeling, climbing or lifting of more than 20 pounds, and he testified that as a result of the left knee injury, claimant is more disabled than he would have been with just the right knee injury, and that his disability and the need for work restrictions are due to a combination of both knee injuries. Cl. Ex. 1 at 12-14; Cl. Ex. 21.

Claimant next contends that the administrative law judge erred in finding that his left knee condition became permanent on September 16, 1992. Claimant further contends that if the date of permanency found by the administrative law judge is affirmed, he is entitled to temporary total and temporary partial disability benefits from October 16, 1989, the date he became unable to perform his usual work, through September 16, 1992.

The Board has held that a physician's opinion that a condition may ultimately require surgery does not preclude a finding that claimant's condition is permanent if the disability is of an indefinite duration. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985); *see generally Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In his deposition on July 21, 1991, Dr. Nichols stated that surgery would improve claimant's left knee condition and that maximum medical improvement had not been reached. Cl. Ex. 1 at 55-56. However, in his chart notes of September 2, 1992, Dr. Nichols stated that surgical intervention was not recommended. Cl. Ex. 20. The administrative law judge concluded, on the basis of this latter notation, that the left knee condition reached permanency because Dr. Nichols had treated the left knee for several years and had not yet given a definitive date of maximum medical improvement. As the administrative law judge's finding that claimant's left knee condition became permanent as of September 1992 is supported by his rational inference from Dr. Nichols' report, we affirm the finding. *SGS Control Services v. Director, OWCP*, 87 F.3d 438, 30 BRBS 57 (CRT) (5th Cir. 1996).

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injuries.

Claimant lastly contends that the administrative law judge erred in finding that claimant's florist job satisfied employer's burden to establish suitable alternate employment. Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (5th Cir. 1988). Contrary to claimant's contention, the administrative law judge rationally credited the testimony of the owner of the florist shop, Mr. Burleson, that he was aware of claimant's knee problems and work restrictions, that claimant's duties were within his work restrictions and that claimant was dismissed because he missed too much work and complaints had been received about him, rather than claimant's contrary testimony.[4] Emp. Ex. H; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge also noted that while working at the florist job, claimant saw Dr. Nichols once about his left knee and did not complain about the job duties.

The Board has held that where claimant is employed in continuous and regular post-injury employment, and claimant loses the job for reasons unrelated to his disability, the job is not precluded as evidence of suitable alternate employment. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). In this case, the administrative law judge credited the testimony of Mr. Burleson and found the job at the florist shop to be suitable alternate employment as claimant worked for six months with no physical problems and was dismissed for reasons unrelated to his reported injuries. As this finding is rational and supported by substantial evidence, we affirm the administrative law judge's finding that suitable alternate employment was established.

As a result of the decision herein, claimant is entitled to temporary total disability benefits from October 16, 1989, the date he became unable to perform his usual longshore work, through May 1992, the date suitable alternate employment was established, because his left knee injury contributed to his inability to perform his usual job. 33 U.S.C. §908(b). Further, once suitable alternate employment was established, claimant is entitled to

[4]Claimant worked as a driver for the florist shop and also performed odd jobs at the business and Mr. Burleson's house. Claimant contended that his tasks were inconsistent with his restrictions and included squatting, kneeling, climbing, building pens for animals and painting horse trailers. Claimant contends that he told Mr. Burleson he would miss work on the day in question and but was fired the next day for missing work.

temporary partial disability benefits until the date of maximum medical improvement. 33 U.S.C. §908(e). We therefore modify the administrative law judge's decision to provide that claimant is entitled to temporary total disability benefits from October 16, 1989 through May 1992, and to temporary partial disability benefits from May 1992 until September 16, 1992.[5] Claimant, however, is not entitled to any benefits thereafter, as the leg is a member under the schedule at 33 U.S.C. §908(c)(1)-(20), and claimant did not present any evidence concerning the extent of permanent impairment to the left knee.

[5]We note, however, that the parties stipulated that any benefits to which claimant is entitled under the Longshore Act are offset by the state award received by claimant. *See* 33 U.S.C. §903(e).

Accordingly, the administrative law judge's Decision and Order denying benefits is modified to reflect claimant's entitlement to temporary total disability benefits from October 16, 1989 through May 1992, and temporary partial disability benefits until September 16, 1992, subject to employer's credit under Section 3(e). In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge